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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re LEONARDO L., A person
Coming Under the Juvenile Court
Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

N.L. et al.,

Defendants and Appellants.

B289431
(Los Angeles County
Super. Ct. No. 17CCJP02679)

APPEAL from orders of the Superior Court of Los Angeles County, Stephen Marpet, Commissioner. Affirmed in part, reversed in part.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant N.L.

Jacques Alexander Love, under appointment by the Court of Appeal, for Defendant and Appellant S.P.

Mary Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Appellants N.L. (Mother) and Simon P. (Father) are the parents of Leonardo L., born in July 2017. Appellants contend substantial evidence does not support the juvenile court's jurisdictional findings made under Welfare and Institutions Code section 300, subdivision (b), that (1) Mother's marijuana use and (2) domestic violence between the couple posed a risk to Leonardo's health and safety and put him at risk of serious physical harm.¹ Father also challenges the court's dispositional order, requiring him to drug test and complete a 52-week domestic violence program, and limiting his visits with Leonardo to monitored. Finally, both parents contend the court had no basis to impose a one-year restraining order on Father, keeping him away from Mother. We conclude the finding that Mother's marijuana use supported jurisdiction under section 300, subdivision (b) was not supported by substantial evidence. We otherwise affirm.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

On November 15, 2017 and again on November 25, 2017, the Department of Children and Family Services (DCFS) received referrals for the family. The first caller said Father had smoked marijuana, that Mother and Father were arguing loudly and angrily while the child was present, and that Father broke Mother's cell phone. The second caller said that during a verbal altercation, Mother hit Father while he was holding Leonardo and that Father had pushed Mother.

A caseworker visited Mother's home on November 21, 2017, between the first and second calls, and found Mother and Father present, although Mother had obtained a temporary restraining order (TRO), effective until December 11, requiring Father to keep away.² Mother explained she had called Father to come assist her because she had a job interview. When the caseworker informed them that Father could not be present while the TRO was in effect, even with Mother's consent, Father left. The caseworker observed Mother interacting with Leonardo in an appropriate manner and saw no evidence that she was under the influence of any substance. Leonardo was healthy, groomed and dressed, and displayed no signs of abuse. Mother admitted she and

² In the November 16, 2017 TRO request, Mother said Father "constantly breaks in my home [and] steals my property," "yells and becomes very angry and intimidating," "threaten[s] to call child protective services," and "follows me to my friend's house or where[ever] I go."

Father argued loudly, but denied physical violence. Mother said that Father followed her to school, work, friends' homes and "anywhere she goes" because he was jealous. She showed the caseworker police reports from November 9 and 15. The first time, Mother called because Father broke into her apartment and took her television. The second time, a neighbor called because Father refused to leave when Mother asked that he do so because she suspected he was under the influence of marijuana.

The caseworker paid another visit to the home on November 28. Mother admitted she had used marijuana "a lot" prior to her pregnancy, and that she had tested positive when Leonardo was born.³ She said she currently used it for anxiety, but never when Leonardo was with her, and had last used marijuana on November 16. She later said November 16 was the only time she had used marijuana since Leonardo's birth.⁴

The caseworker interviewed Father on November 21, and concluded he was under the influence of some substance, although he denied it. Father also denied domestic violence, saying he loved Mother and would never yell at her or put his hands on her. A friend of Mother's reported that Father had grabbed Leonardo on November 26, when Mother and Leonardo were at church, and tried to take the boy away, but

³ DCFS had begun an investigation in July 2017, when Leonardo was born, but found the allegations of general neglect inconclusive. Mother had a negative drug test in August 2017.

⁴ Mother tested positive for cannabinoids on November 22.

had been talked out of it. Mother's caseworker reported that she was in danger of losing her housing because of her frequent loud arguments with Father and the police response.⁵

On December 22, 2017, DCFS filed a section 300 petition, seeking jurisdiction over Leonardo based on Mother's and Father's marijuana use. The petition claimed that it rendered them incapable of providing regular care and supervision of the child, endangered his physical health and safety, and placed him at risk of physical harm. Prior to filing the petition, DCFS sought, and was denied, a removal order. At the detention hearing, the court released Leonardo to Mother and ordered monitored visitation for Father.

In an interview for the February 2018 jurisdictional report, Mother said Father had broken into her apartment three times. The first time, he took a television. The second and third times, he had taken a window off in order to gain entry. Concerning marijuana use, Mother said she had been introduced to marijuana when she was 13 by her abusive stepfather. She said Father smoked marijuana daily. Father admitted using marijuana daily for various medical conditions, including anxiety, arthritis and insomnia. Mother tested negative for all substance on February 6, 2018 and February 23, 2018. By the time of the report, she had a

⁵ Mother had been a dependent child due to abuse by her stepfather, and when proceedings began, was participating in a program of assistance for dependent children who had turned 18.

job and was participating in individual therapy and a domestic violence program for victims.

On March 14, 2018, DCFS filed an amended petition, adding allegations that Mother and Father had a history of engaging in verbal altercations in the child's presence, that Father broke Mother's phone, that Father broke into Mother's apartment, that Father removed a window from Mother's apartment on two occasions and that Father had stalked Mother at school, at her workplace and when she was out with friends. The amended petition said both parents "failed to comply with the restraining order" because "[M]other allowed [Father] into [her] apartment while the restraining order was in effect."

At the April 11, 2019 jurisdictional hearing, counsel for DCFS argued that the petition should be sustained because the absence of physical abuse did not "negate the behavior of [Father] against [Mother] as being stalking, violent and controlling, having an effect mentally on [Mother]." Counsel discussed the evidence that Father had broken into Mother's home, removed a window, smashed Mother's cell phone and tried to take Leonardo from church without Mother's permission. Counsel also urged the court to sustain the marijuana allegations as to both parents, acknowledging that there was "not really any showing of inadequate supervision" but contending that Father's marijuana use was a factor in the November 15 fight.

Counsel for the child urged the court to sustain only the domestic violence allegation. She asked that Mother be

stricken from the petition and that Leonardo remain in Mother's care, with both parents receiving domestic violence counseling and parenting classes.

Mother's counsel contended the marijuana allegation should be dismissed because there was no evidence that Leonardo had been placed at risk of harm as a result of Mother's marijuana use, noting that she had had only one positive test. Father's counsel contended both marijuana allegations should be dismissed, pointing out that there was no evidence Leonardo was anything other than healthy and well cared for. Father's counsel also contended that the domestic violence allegation should be dismissed, as there had been no incidents since November 2017, and no new allegations to justify filing the amended petition.

The court sustained the domestic violence allegation and the allegation that Mother's marijuana use rendered her incapable of providing regular care and supervision of Leonardo, finding jurisdiction appropriate under section 300, subdivision (b) (failure to protect).⁶ At the hearing, the court observed that Mother had called the police during an argument and obtained a restraining order against Father, indicating that she was fearful of him, and that Father had violated the restraining order. The court stated: "I can't wait until the two of you do something awful and get

⁶ The court did not sustain the allegation that Father's marijuana use put the child at risk. It also struck an allegation that jurisdiction was appropriate under section 300, subdivision (a) (serious physical harm).

involved in a physical altercation in front of [the] child or with . . . Mother holding the child and the child ends up in a hospital.” With respect to Mother’s marijuana use, the court stated: “My concern with Mother is this[:] by her own admission she’s indicated she’s been using marijuana for a substantial period of time, since [she was] 12 or 13, according to the report. And [when] the child was born [there was] marijuana in [Mother’s] system.”

Turning to disposition, the court placed Leonardo in Mother’s custody, and stated: “I can’t release to Father[.] He hasn’t done anything [referring to the DCFS-recommended counseling and domestic violence programs]. He doesn’t know anything about domestic violence and its [e]ffects on the family.” Consequently, Father was restricted to monitored visitation. The court directed Mother to drug test, complete a parenting class, and participate in domestic violence counseling and individual counseling. Father was directed to complete a 52-week domestic violence program and to drug test for substances “other than marijuana” and for evidence of a “spike” in his marijuana use.⁷ The court extended the restraining order for one year, to April 2019, over both parents’ objections.⁸ Both Mother and Father

⁷ Father’s counsel objected to the dispositional plan.

⁸ The superior court had previously extended the TRO to March 15, 2018. The juvenile court had extended it to April 11, 2019. The one-year restraining order issued by the dependency court at the April 2018 hearing named Mother as the protected party.

appealed the jurisdictional order. Father also appealed the dispositional order.

DISCUSSION

A. *Jurisdiction*

1. *Mother's Marijuana Use*

The juvenile court may properly assert jurisdiction over a minor child under section 300, subdivision (b) if “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child, or the willful or negligent failure of the child’s parent . . . to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, . . . or by the inability of the parent . . . to provide regular care for the child due to the parent’s . . . substance abuse.” The juvenile court’s jurisdictional finding must be supported by a preponderance of the evidence. (§ 355, subd. (a); *In re Christopher M.* (2014) 228 Cal.App.4th 1310, 1318.) The evidence must show that at the time of the jurisdictional hearing, the child was at a substantial risk of serious physical harm in the future. (*In re D.L.* (2018) 22 Cal.App.5th 1142, 1146.) Evidence of past contact may be probative of current conditions, but “there ‘must be some reason beyond mere speculation to believe the alleged conduct will recur.’” (*Ibid.*) We review the juvenile court’s jurisdictional findings for substantial evidence, taking into

account the entire record, considering the evidence in the light most favorable to the findings, and drawing all reasonable inferences in support of such findings. (*Ibid.*) Mother contends substantial evidence does not support that Leonardo was at risk of serious physical harm or illness from her marijuana use. We agree.

Even when recreational use of marijuana was illegal, courts agreed that a parent's occasional use, standing alone, could not support the finding of serious harm or serious risk of harm required for assertion of jurisdiction under section 300, subdivision (b). (See, e.g., *In re Drake M.* (2012) 211 Cal.App.4th 754, 768; *In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003; *In re Alexis E.* (2009) 171 Cal.App.4th 438, 452-453; *In re David M.* (2005) 134 Cal.App.4th 822, 829-830, disapproved in part on another ground in *In re R.T.* (2017) 3 Cal.5th 622; *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346.) To establish jurisdiction, DCSF was required to prove that the parent's use of the drug created a specific, nonspeculative, substantial risk of serious physical harm to the child. (*In re Drake M.*, *supra*, at pp. 763-765; *In re Destiny S.*, *supra*, at pp. 1003-1005; *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 727; *Jennifer A. v. Superior Court*, *supra*, at p. 1346.) For example, in *In re Drake M.*, where the evidence established that the minor was well cared for and that the father was employed, and there was no showing that the child had been given access to marijuana or drug paraphernalia or exposed to secondhand smoke, the court found that DCFS had failed

to prove a link between the father's use and a risk of serious physical harm to the child, or that the father had failed to provide the child with adequate supervision or protection as required by subdivision (b) of section 300. (*In re Drake M.*, at p. 769.)⁹

In contrast, the court in *In re Alexis E.* upheld a finding of jurisdiction based on a substantial risk of harm from the father's use of marijuana where the father smoked marijuana twice a day, sometimes in the presence of the children, and the evidence established that his habit caused him to neglect his children. (*In re Alexis E.*, *supra*, 171 Cal.App.4th at pp. 451-453.) The court had "no quarrel"

⁹ Respondent cites *In re A.F.* (2016) 3 Cal.App.5th 283, for the proposition that a parent's "inability to refrain from alcohol use despite being tested and knowing its use would negatively affect the proceedings supported a removal order." Jurisdiction in *A.F.* was based on the mother's use of a combination of alcohol and methadone despite knowing the combination was potentially lethal and likely to affect her judgment. (*Id.* at p. 290.) She was observed to be extremely intoxicated while picking the minor up from the father, "slurring and staggering" and failing to recognize her own sister-in-law. (*Ibid.*) In addition, she had left her supply of methadone in a place where it was accessible to the child. (*Id.* at p. 292.) The court specifically found the situation before it "unlike *Drake M.*, where there was no evidence of any "specific, defined risk of harm,"" because the mother was both "abusing the substances and using them in a manner that affected her judgment and placed the minor at risk." (*Id.* at p. 292.) In any event, Mother had a single positive drug test in November 2017, *prior* to the initiation of the underlying proceedings. Her subsequent tests were clean.

with the father's assertion that "his use of medical marijuana, without more, cannot support a jurisdiction finding" (*Id.* at p. 453, italics omitted.) However, the court explained, the record in that case "set out the 'more' that supports the [juvenile] court's finding that [the father's] use of medical marijuana presents a risk of harm to the minors." (*Ibid.*)

Here, there was no evidence that Mother had used marijuana on more than an occasional basis during her pregnancy and after Leonardo's birth. She admitted using it once on November 16, and tested positive a few days later. Her two later tests were negative. Mother was employed and participating in her required programs in advance of the court's dispositional order. No one reported observing her under the influence while caring for Leonardo, including the caseworker who visited her home and interviewed her on multiple occasions. As DCFS's counsel acknowledged during oral argument, there was no evidence of inadequate supervision. Leonardo was healthy and well cared for. His own counsel saw no reason for the marijuana allegation to be sustained. The only connection marijuana use had with any allegations of abuse, was the evidence that Father's marijuana use had been a factor in the November 15 verbal argument and Father's refusal to leave when asked. On this record, substantial evidence did not support that Mother's marijuana use put Leonardo at risk.

2. Domestic Violence

Both Mother and Father contend there was insufficient evidence to support assertion of jurisdiction based on domestic violence. Courts have held that “domestic violence in the same household where children are living” can be considered “a failure to protect [them] from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.” (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194, disapproved in part on another ground in *In re R.T.* (2017) 3 Cal.5th 622; accord, *In re T.V.* (2013) 217 Cal.App.4th 126, 135.) The evidence here supported the section 300, subdivision (b) finding.

The record reflects that there were multiple incidents of fighting that became so loud and angry that neighbors became alarmed and called DCFS, and that on one occasion a neighbor called the police. During one altercation, Father refused to leave when asked and grabbed and broke Mother’s cell phone, typical behavior for abusers who do not want the victim to call for help. Father had also begun to engage in stalking behavior, following Mother around due to “jealousy.” Worse, he broke into her apartment multiple times and took items without permission. He also tried to take Leonardo without Mother’s permission when Leonardo and Mother were at church and threatened to report Mother to child protective services. On this evidence, the court could reasonably believe that whether or not physical violence had yet occurred, the situation would soon escalate, and that

Leonardo could be caught in the middle and physically harmed.

Appellants point out that the reported incidents of domestic violence were five months old by the time of the jurisdictional hearing, and that no new incidents had been reported. This was not evidence that the couple's problems had been alleviated. Father had commenced neither individual counseling nor a domestic violence program. The record reflects that the domestic violence ceased because DCFS became involved and insisted that Father stay away from Mother and obey the restraining order. The court could reasonably conclude that the problems underlying the intensive verbal altercations and stalking behavior would grow worse over time without dependency intervention.

B. Disposition

Father challenges the court's dispositional orders, contending that substantial evidence does not support its decision to remove Leonardo from his custody and restrict his visitation to monitored, and that the reunification plan requirements that he complete a 52-week domestic violence program and drug test were not appropriate for his situation. For the reasons discussed, we disagree.

1. Removal of Custody/Restriction of Visitation

After finding that a child is a person described in one of the subdivisions of section 300 and therefore the proper subject of dependency jurisdiction, the court must determine

“the proper disposition to be made of the child” (§ 358), including an appropriate visitation schedule for the parents (§ 362.1). “[T]he dependency court has the power under section 361, subdivision (a) and section 362, subdivision (a) to limit the access of a parent with whom the child does not reside and thus effectively remove the child from the noncustodial parent.” (*In re Julien H.* (2016) 3 Cal.App.5th 1084, 1090; see also § 362, subd. (a) [authorizing the court to “make any and all reasonable orders for the care, supervision, custody, conduct, maintenance and support of the child”].) But “[b]efore the court may order a child physically removed from his or her parents, it must find, by clear and convincing evidence, the child would be at substantial risk of harm if returned home and there are no reasonable means by which the child can be protected without removal. [Citations.]” (*In re Hailey T.* (2012) 212 Cal.App.4th 139, 145-146.) “[T]he court may consider the parent’s past conduct as well as present circumstances.” (*In re Cole C.* (2009) 174 Cal.App.4th 900, 917.) “The . . . child need not have been actually harmed for removal to be appropriate. The focus of the statute is on averting harm to the child.” (*Ibid.*; accord, *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1656-1658.) On review of the court’s dispositional findings, “we employ the substantial evidence test, however bearing in mind the heightened burden of proof.” (*In re Kristin H.*, *supra*, at p. 1654.)

Here, the evidence supported that Father was easily roused to anger and jealousy and had engaged in stalking

behavior that caused Mother to feel threatened, and that there was a substantial danger of escalation. Although his anger had not been directed at Leonardo, the fact that Father was willing to take Leonardo without Mother's consent, break into the child's home, and use the child as a weapon by threatening to call child protective services when arguing with Mother was legitimately concerning. The court's decision to limit Father's visitation until he participated in counseling and completed a domestic violence program was supported by the evidence.

2. Reunification Plan Requirements

At the dispositional hearing, the juvenile court orders child welfare services for the minor's parents to facilitate reunification of the family, and has "broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accord with this discretion." (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006, see § 361.5, subd. (a).) A juvenile court's reunification order "must be 'reasonable' and 'designed to eliminate those conditions that led to the court's finding that the child is a person described by Section 300.'" (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1229, quoting § 362, subd. (c).) The reunification plan ""must be appropriate for each family and be based on the unique facts relating to that family." [Citation.]" (*In re Nolan W.*, *supra*, at p. 1229, quoting *In re Christopher H.*, *supra*, at p. 1006.) The plan need not, however, be tied directly to a sustained

jurisdictional allegation; “when the court is aware of other deficiencies that impede the parent’s ability to reunify with his child, the court may address them in the reunification plan.” (*In re Christopher H.*, *supra*, at p. 1008.)

With respect to the 52-week domestic violence program, this requirement was directly tied to the court’s finding that multiple incidents of intense verbal altercations took place in the child’s presence, including one where police were called and one where Father took and broke Mother’s cell phone, and that Father engaged in stalking behavior -- breaking into Mother’s apartment multiple times and following her. There is no merit to Father’s contention that this requirement was inappropriate.

With respect to drug testing, the court accepted that Father’s daily use of marijuana was a necessary evil to treat his medical conditions, and struck the allegation that Father’s marijuana use supported assertion of jurisdiction under section 300, subdivision (b). The drug testing was ordered to ensure that Father did not combine medical marijuana with other substances that could lead to further loss of judgment (see *In re A.F.*, *supra*, 3 Cal.App.5th 283) or drastically increase his marijuana consumption. It was not unreasonable given the evidence presented to the court that Father’s marijuana use contributed to the verbal altercations that had already led to DCFS intervention.

C. Restraining Order

Finally, appellants challenge the court's one-year restraining order. We find no reversible error.¹⁰

After the time a petition has been filed to declare a child a dependent of the juvenile court and until that petition is dismissed or dependency terminated, section 213.5, subdivision (a) permits the juvenile court to issue orders “enjoining any person from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, . . . destroying the personal property, contacting, . . . coming within a specified distance of, or disturbing the peace of any parent, legal guardian, or current caretaker of the child” In reviewing a restraining order by the juvenile court pursuant to section 213.5, “appellate courts apply the substantial evidence standard to determine whether sufficient facts supported the factual findings in support of a restraining order and the abuse of discretion standard to determine whether the court properly issued the order. [Citations.]” (*In re Carlos H.* (2016) 5 Cal.App.5th 861, 866.) ““To show abuse of discretion, the appellant must demonstrate the juvenile court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice.” [Citation.] Throughout our analysis, we will not lightly substitute our decision for that rendered

¹⁰ Although no mootness issue is raised, we note that the protective order is set to expire on April 11, 2019, before this decision will become final.

by the juvenile court. Rather, we must indulge all reasonable inferences to support the decision of the juvenile court and will not disturb its findings where there is substantial evidence to support them.” (*Ibid.*)

With respect to the criteria under which a request for restraining order should be evaluated, we also find pertinent the discussion in *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, in which the court held that before renewing a protective order, “the [trial] court must find the probability of future abuse is sufficient that a reasonable woman (or man, if the protected party is a male) in the same circumstances would have a ‘reasonable apprehension’ such abuse will occur unless the court issues a protective order.” (*Id.* at p. 1287.)

As noted above, the evidence here supported the finding that Father was jealous, engaged in angry arguments with Mother, broke into her apartment, refused to leave when asked, broke her cell phone, threatened her and stalked her. On these facts, the court’s decision to continue to protect Mother by extending a restraining order was not unreasonable.

Father contends the proper procedure was not followed prior to the court’s issuance of the restraining order.¹¹ As no

¹¹ Section 213.5 provides that an application for a restraining order occur “in the manner provided by Section 527 of the Code of Civil Procedure or in the manner provided by Section 6300 of the Family Code.” Appellant contends these provisions require, among other things, that the party to be protected by the order affirmatively request it.

procedural objection was raised at the hearing, any such objection was forfeited. (See *In re A.A.* (2012) 203 Cal.App.4th 597, 605-606; *In re Elijah V.* (2005) 127 Cal.App.4th 576, 582.)

DISPOSITION

The jurisdictional order is reversed to the extent it bases jurisdiction on Mother's use of marijuana; it is otherwise affirmed. The dispositional order is affirmed. The order issuing a one-year restraining order is affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.